

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44070
Docket No. MW-43494
20-3-NRAB-00003-190596**

The Third Division consisted of the regular members and in addition Referee Paul S. Betts when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company (Former Missouri Pacific)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier removed and withheld Mr. J. Gamez, Jr. from his assigned welder position on Gang 2382 beginning on October 27, 2014 and continuing through November 26, 2014 (System File UP969PA14/1618913 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Gamez, Jr. shall be compensated “*** for one hundred eighty four (184) hours at the respective straight time rate and any overtime that his gang worked during the time Claimant was removed from service. ***”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

In the instant claim, the Organization alleges the Carrier violated the Agreement when it failed to pay the Claimant for time withheld from service pending the results of a supervisor-requested medical evaluation.

On October 27, 2014 and based upon a supervisor-requested medical evaluation, the Claimant was removed from service. The Claimant's supervisor reported to the Carrier's Health and Medical Services Departments (HMS) that the Claimant became easily fatigued and had been observed stumbling, feeling weak, and shaking due to exhaustion. On October 27, HMS contacted the Claimant regarding the supervisor-requested medical evaluation. The Claimant told HMS that he got warm when he worked doing thermite welding but did not notice significant shaking. The Claimant also told HMS that he did not think he had any issues with unsteadiness, stating "I am walking on ballast...everyone is unsteady walking on ballast." The Claimant also told HMS that he was under medical care for gout and kidney stones. The Carrier requested the Claimant provide medical records for the last year, and scheduled the Claimant to undergo a cardio evaluation and exercise tolerance test (ETT).

The two tests were performed on November 11, 2014. Dr. Sanchez, the doctor performing the cardio evaluation and ETT, provided HMS with a return to work release on November 12, 2014, but failed to provide HMS with the clinical notes associated with the testing. The Carrier requested the clinical notes from Dr. Sanchez on both November 12th and 20th, 2014. The Carrier then received the clinical notes from Dr. Sanchez on November 20, 2014. On November 21, 2014, HMS reviewed the clinical notes related to the tests performed, finding the Claimant had a normal cardiac work-up with adequate aerobic function. HMS noted that the Claimant's possible history of gout may have explained the supervisor's report that the Claimant had difficulty walking. On November 25, 2014, HMS finalized its review of all medical records, clearing the Claimant to return to work without restrictions, notifying both the Claimant and supervisor of said release.

In summary, the Organization argues a) the Carrier arbitrarily removed the Claimant from service based upon hearsay from other employees, b) the Carrier failed to provide any evidence of an ailment that would prohibit the Claimant from safely performing his duties, c) the Claimant was fit for duty at all times and the Carrier, rather than the Claimant, should bear the financial costs associated with the Claimant

being withheld from service, d) medical records indicate the Claimant was free of any medical issue preventing him from performing service, and e) the requested remedy is proper and appropriate.

In summary, the Carrier argues a) the removal of the Claimant from service pending a fitness for duty evaluation was proper under the Agreement, b) the amount of time the Claimant was withheld is reasonable given that the clinical notes for the cardio exam and ETT were not received by the Carrier until November 24, 2014, c) the fact that there were no medical restrictions placed on the Claimant upon his return to work does not mean that the temporary removal of the Claimant was not justified, and d) the Organization failed to satisfy its burden of proof.

It is well established that the Carrier has the right to withhold employees from service for medical reasons, provided the Carrier has a rational basis for its determination. Based upon the health-related observations reported to HMS by the Claimant's supervisor, the Board finds the Carrier properly withheld the Claimant from service to complete and review the additional medical tests required by HMS. However, the Organization argues the Claimant was always fit for duty and the Carrier, rather than the Claimant, should bear the financial costs associated with the Claimant being withheld from service. In support of that position, the Organization supplied the Board with a variety of recent Third Division awards detailing "the risk of fallibility." [See Third Division Awards 41393, 42978, 43245, and 42762] These awards recognize the Carrier's right to withhold employees from service for medical reasons but also maintain that the right is not unfettered. In Third Division Award 41393, the Board explained this principle:

"Even if the Carrier has a rational basis to withhold an employee from duty, the Board has held that when it does so, it bears what Referee Dana Eischen called in Second Division Award 7033 "the risk of fallibility."... The "risk of fallibility" is another way of saying that if a physically qualified employee is held off work pending medical evaluation, it is the Carrier, not the employee, who should bear the financial consequences of its decision to withhold the employee from work."

The reasoning in Award 41393, as well as the other Awards cited by the Organization, are instructive in the instant case. The Claimant was pulled from service based upon a supervisor-requested evaluation. Based upon the supervisor-requested

evaluation, HMS had the Claimant undergo a cardio exam and ETT. Findings from the exams showed the Claimant with a normal cardiac work-up and adequate aerobic function. The Claimant was released to work with no restrictions.

As discussed in the Awards noted above and given the facts presented here, the Claimant should not bear the financial burden of being withheld from service. As a result, the claim is sustained.

Although the Board may not have repeated every item of documentary evidence, nor all the arguments presented, we have considered all the relevant evidence and arguments presented in rendering this Award.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 11th day of August 2020.